Criminal law -- Counsel -- Motion by public defender to appoint other counsel in unappointed noncapital felony cases, arguing that public defender cannot ethically or legally accept additional noncapital felony cases at this time because of excessive caseloads created by underfunding of public defender's office -- Standing -- State attorney does not have standing to respond to motion as matter of right, but is allowed to participate in proceeding as amicus curiae -- Where public defender's active caseload is extremely high, resulting in attorneys providing minimally competent representation at best, and it is clear that future appointments to noncapital cases will create conflict of interest in presently handled cases, proper course of action is for public defender to decline to accept appointments in "C" felony cases but continue to perform full duties in all "A" and "B" felony cases, continue to perform bond hearing duties in all cases, and continue customary duties of county-funded early representation unit up to time of arraignment in all cases -- At arraignment, Office of Criminal Conflict and Civil Regional Counsel for Third District is to accept all "C" felony cases for indigent defendants

IN RE: REASSIGNMENT AND CONSOLIDATION OF PUBLIC DEFENDER'S MOTIONS TO APPOINT OTHER COUNSEL IN UNAPPOINTED NONCAPITAL FELONY CASES. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County, Criminal Division. Section CF 61. Case No. 08-1, Administrative Order No. 08-14. THE STATE OF FLORIDA, Plaintiff, v. HAROLD LOVERIDGE, GANTT ADAMS, TEDRICK MCINTYRE, LONNIE CARSWELL, REMIGIO CARRILLO, RAUL RIVERO, PABEL MIRANDA, WILLIE KEELS, EDWARD SHOEGREEN, ALEXANDER ROBERTSON, PATRICIA ANDUJAR, SILVINO MEDEROS, JOHN THREATS, JOEL CHARLES, OSCAR MUNOZ, FRANCISCO FRAGA-MARTINEZ, BONNIE LOWERY, JED GRANT, JOSE AROCHA, NYLUS STANTON, JEFFREY JAMES, Defendants. Case Nos. F08-14858 (CF01), F08-12840 (CF02), F08-5820A (CF03), F08-8919 (CF04), F08-17339 (CF05), F08-13758 (CF06), F08-16093 (CF07), F08-22408 (CF08), F08-18074 (CF09), F08-2462 (CF 10), F08-5109 (CF 11), F08-1872 (CF 12), F08-17830 (CF13), F08-17334 (CF14), F08-2314 (CF15), F08-10548 (CF16), F08-19720 (CF17), F08-16823 (CF18), F08-7374 (CF19), F08-11423 (CF20), F08-13649 (CF21). September 3, 2008. Stanford Blake, Judge. Counsel: Penny Brill, Assistant State Attorney (amicus). Parker D. Thomson, Alvin Lindsay, Julie Nevins, and Matthew Bray, Hogan & Hartson, LLP, Miami, for Public Defenders.

ORDER GRANTING IN PART AND

DENYING IN PART PUBLIC DEFENDER'S

MOTION TO APPOINT OTHER COUNSEL

IN UNAPPOINTED NONCAPITAL FELONY CASES

THIS CAUSE came before the Honorable Stanford Blake, Administrative Judge, Criminal Division, of the Eleventh Judicial Circuit Court, at the Richard E. Gerstein Justice Building, 1351 NW 12th Street, Courtroom 2-4, Miami, FL 33125. The matter was heard Wednesday, July 30, 2008, and Thursday, July 31, 2008, on the Public Defender's "Motion to Appoint Other Counsel in Unappointed Noncapital Felony cases." Post hearing memoranda was provided to the Court by PD-11 and SAO-11 on August 11, 2008.

The Public Defender of the Eleventh Judicial Circuit (PD-11) filed their motion and a "Certificate of Conflict of Interest," in felony cases. This Court, through Administrative Order No. 08-14 by Chief Judge Joseph P. Farina, reassigned and consolidated these motions and all subsequent motions containing identical issues for all purposes necessary to effect the prompt disposition of cases and control the docket in the Eleventh Judicial Circuit.

PD-11 asserts that accepting appointments to noncapital felony cases at this time would create conflicts of interest with previously appointed clients and newly appointed clients in cases other than noncapital felony cases. PD-11 argues that the underfunding of the Public Defender's Office has created excessive caseloads such

that PD-11 cannot ethically or legally accept additional noncapital felony cases at this time. In response, the State Attorney's Office (SAO-11) argues that the granting of this motion will create chaos in the criminal justice system and lead to the dismissal of serious and violent felony cases. SAO-11 opposes the method that PD-11 has chosen to air its grievances, but does not dispute the fact that PD-11 has felt a severe reduction in its budget, nor the fact that PD-11's concerns pertaining to underfunding are based on the Public Defender's sincere convictions.

I

SAO-11 contends it has a right and a duty to respond to PD-11's motion. It bases this right on Section 27.02, Fla. Stat., which states that "[t]he state attorney shall appear in the circuit and county courts within his or her judicial circuit and prosecute or defend on behalf of the state all suits, applications, motions, civil or criminal, in which the state is a party, except as provided in chapters 39, 984, and 985." Although SAO-11 relies on Section 27.02, Fla. Stat., to support its argument of standing as a matter of right, case and statutory law indicate that this section is inapplicable to situations involving the public defender's certification of conflict of interest. Case law supports the view that the court has the discretion to grant requests to be heard on an issue involving the public defender's request to appoint other counsel. *Escambia County v. Behr,* 384 So. 2d 147, 150 (Fla. 1980) (where the Florida Supreme Court held that the court does not have to allow the county an opportunity to be heard before appointing private counsel in lieu of the public defender.); *In re Order on Prosecution of Appeals by the Tenth Judicial Circuit Public Defender,* 561 So. 2d 1130, 1134 (Fla. 1990).

As further guidance in this matter, Section 27.5303(a), Fla. Stat., titled "Public Defenders; criminal conflict and civil regional counsel; conflict of interest," states that the court "shall review" the adequacy of the public defender's representations regarding a conflict of interest without requiring the disclosure of any confidential communications. In addition, the court "may inquire or conduct a hearing" into alleged conflict. *Id.* Under the plain meaning of the statute, the use of the word "may" renders an inquiry or hearing of the court entirely discretionary. *State v. Meyers,* 708 So. 2d 661, 663 (Fla. 3d DCA 1998); *City of Miami v. Save Brickell Ave., Inc.,* 426 So. 2d 1100, 1105 (Fla. 3d DCA 1983). It follows that the nature and manner of a discretionary hearing likewise rests within the sound discretion of the court. Thus, this court finds that the State Attorney does not have standing as a matter of right.

However, the State Attorney's role in the community not only includes prosecuting those charged with committing crimes, but also includes specific duties related to the administration of justice and ensuring the constitutional rights of victims of crimes are protected. In an effort to safeguard these concerns, this Court granted SAO-11's request to participate in the proceedings as an "amicus curiae" or a friend of the court. The Court allowed SAO-11 great latitude in its participation in this hearing. SAO-11 responded to all PD-11's pleadings and documentary evidence, cross-examined PD-11's witnesses, and presented its own witness in opposition of the evidence presented by PD-11's witnesses.

II

Section 27.51, Fla. Stat., titled " Duties of public defenders" reads in pertinent part:

> (1) The public defender shall represent, without additional compensation, any person determined to be indigent under section 27.52 and:
>
> (a) under arrest for, or charged with, a felony.

While the court is concerned that there not be chaos in the criminal justice system, the court must also serve as the protector of due process and meaningful representation of the accused. Public defenders, like all attorneys, are bound by professional ethical obligations. *See State v. Kadivar,* 460 So. 2d 391, 392 (Fla. 4th DCA 1994). The Rules of Professional Conduct include, among other responsibilities, that a lawyer provide competent representation to a client, act with reasonable diligence and promptness in representing a client, and decline or

terminate representation if the representation will result in a violation of the rules. R. Regulating Fla. Bar 4-1.1,4-1.3,4-1.16. Most importantly here, the rule on conflict of interest requires an attorney to decline a case if there is substantial risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client. R. Regulating Fla. Bar 4-1.7(a)(2).

The Public Defender, Bennett Brummer, as manager and supervisor of other lawyers, has a duty to ensure that all lawyers in his office conform to the Rules of Professional Conduct. R. Regulating Fla. Bar 4-5.1. The evidence presented by PD-11 at the two (2) day hearing on these motions showed that the assistant public defenders of the Eleventh Judicial Circuit function under extreme and excessive caseloads.[1] Although there is dispute regarding the method in which PD-11 calculated its annual noncapital felony caseload numbers, the testimony and evidence presented at the hearing indicated that the caseload of the felony public defenders in the Eleventh Judicial Circuit, under any recognized standard, far exceeds any recognized standard for the maximum number of felony cases a criminal defense attorney should handle annually. *See* National Advisory Commission on Criminal Justice Standards and Goals limit of 150 cases; Florida Governor's Commission Standard limit of 100 cases; Florida Public Defender's Association limit of 200 cases; and Florida Bench and Bar's limit of 200 cases.

More importantly, the evidence shows that the number of active cases is so high that the assistant public defenders are, at best, providing minimal competent representation to the accused. At the request of this Court, PD-11 provided a chart, referred to as the “Judge Blake” document, which lists the total number of felony appointments for fiscal year 2007-08. This chart indicates the number of cases that were pled at arraignment, no actioned, bound down to misdemeanors, and referred to pretrial intervention for FY 2007-08. It also shows the number of conflict cases and cases where private counsel substituted in as attorney of record. Although this Court is aware that many of these cases require minimal preparation, the Court recognizes that the public defender's office has often performed work, including investigatory functions, on these cases prior to the cases being resolved. Thus, even the numbers reflected in the “Judge Blake” document indicate that PD-11's active caseload is extremely high.

The record further shows that the assistant public defenders assigned to handle “A and B” felony cases (life, 1st and 2d degree) are now being appointed to “C” felony cases (3d degree). These “C” cases encompass approximately sixty percent (60%) of all felony filings. A supervising attorney for PD-11, Stephen Kramer, testified that all supervising attorneys are handling “C” felony cases to the detriment of their ability to handle capital cases and “A and B” felony cases. Assistant Public Defender Amy Weber, an “A” felony attorney, testified that she is in court two out of three weeks because she also has “C” felony cases. From the testimony and evidence presented, “C” felony cases are clogging the system and negatively impacting PD-11's felony attorneys' caseload.

Additionally, there is no dispute that PD-11's trial budget has been cut by 9.2% in the past two fiscal years. With the additional holdbacks imposed for Fiscal Year 2008-09, PD-11 is operating under a 12.6 % budget reduction. As a result of the reduced budget, the number of noncapital felony public defenders has declined in the last two fiscal years, and this downward trend is continuing. PD-11 is unable to raise salaries, and a number of assistant public defenders hold second jobs on nights and weekends simply to make ends meet. As noted in Rory Stein's testimony, General Counsel for PD-11, two main reasons for leaving PD-11 were financial (low salaries and lack of raises) and burnout from the excessive workload. At the same time that resources have dwindled, the number of noncapital felony cases assigned to PD-11 has explosively increased by approximately 29% since Fiscal Year 2003-04.

In light of the foregoing, the evidence clearly establishes that PD-11 is in need of relief sufficient to ensure that the assistant public defenders are able to comply with the Florida Rules of Professional Conduct and carry out their constitutional duties.

III A fundamental rule, strongly grounded in public policy, is that a public body is presumed correct when exercising its discretionary powers within the orbit of laws affecting them. *City of Miami Beach v. Cummings*,

266 So. 2d 122, 125 (Fla. 3d DCA 1972); s*ee In Re Certification of Conflict in Motions to Withdraw filed by Public Defender of the Tenth Judicial Circuit*, 636 So. 2d 18, 22 (Fla. 1994). The court should not "attempt to interfere in the management of the Public Defender's office, or attempt to instruct the Public Defender how best to conduct his affairs." *In Re Certification of Conflict*, 636 So. 2d at 22. Accordingly, the court's inquiry is limited to an objective assessment of the Public Defender's practices sufficient to confirm that a factual basis exists for the Public Defender's motions. *Id.*

SAO-11 raises several different concerns with PD-11's motions and certificate of conflicts. First, SAO-11 questions PD-11's method of collecting the data and caseload numbers for its caseload statistics. SAO-11 contests PD-11's reliance on state and national methods for defining and counting cases beginning with the appointment of counsel after arrest. Yet, SAO-11 has failed to present any alternative national or Florida caseload standard used by professionals in the field.

SAO-11 further argues that PD-11 should seek relief, as other Public Defenders have done, through non-appointment to misdemeanor cases. However, SAO-11 failed to show that the situation in those circuits are similar to the situation in this circuit, or that the proposed alternative would be effective or feasible in this circuit. Moreover, the Public Defender, Bennett Brummer, testified that he filed his certificates of conflict in the felony divisions "where we had our highest concentration of dollars and workload in the office, so as to make an impact on the workload of the office." He also testified that refusing misdemeanors would result in closing the County Court division. Such a move would effectively destroy PD-11's "farm system" which enables inexperienced attorneys to gain the experience necessary to accept and defend felony cases.

SAO-11 criticizes PD-11's method for airing its grievances with the legislature and not sitting down and working things out.[2] However, the record is replete with letters from PD-11 to the legislature, at different times, advising it of PD-11's excessive workload history. Yet, after the shift in funding in 2004 due to the implementation of Article V, Revision 7, the legislature appropriated funds for only 52 of the 82 county-funded positions for PD-11's overload special assistant public defenders.

The testimony and evidence presented at the hearing demonstrates that the certifications of conflict are based on fact. Accordingly, this Court finds that a factual basis exits for PD-11's motion to appoint other counsel in unappointed noncapital felony cases.

IV

This Court concludes that the testimonial, documentary, and opinion evidence shows that PD-11's caseloads are excessive by any reasonable standard. As a result, its attorneys are able to provide, at best, minimally competent representation in their assigned cases. Further, it is clear that future appointments to noncapital felony cases will create a conflict of interest in the cases presently handled by PD-11. All the same, it is incumbent upon the court to preserve order in the criminal justice system to ensure the safety of this community. Accordingly, this Court finds that the proper course to be followed in such a situation is for PD-11 to decline to accept appointments to "C" felony cases until such time as this Court determines that PD-11 is able to resume its constitutional duties with respect to these cases. PD-11 must continue to perform its full duties in all "A" and "B" felony cases, and is required to continue its bond hearing duties for all cases on a limited basis only. Further, PD-11's county-funded early representation unit (ERU) is to continue with their customary responsibilities up to the time of arraignment. At arraignment, the Office of Criminal Conflict and Civil Regional Counsel for the Third District (RRC-3) is to accept all "C" felony cases for indigent persons. If RRC-3 determines that it has a conflict of interest, it is their responsibility to separately move to withdraw and ask the court to appoint other counsel.[3] This matter will be set for a recurring 60 day review with weekly "Weed Attorney Assignment Sheets "[4] to be submitted to the Court to allow it to monitor the status of PD-11's caseload. This order shall take effect on Monday, September 15, 2008. The first review of this Order will be held on Friday, November 14, 2008 at 9:00 a.m. before this Court.

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[1]PD-11 requested this Court to take judicial notice of the Florida Bar News article, August 13, 2008 discussing cutbacks for funding of the criminal justice system. Arthur “Buddy” Jacobs, Esq., co-counsel for amicus curiae in this case, was quoted as stating that 710 assistant state attorney's positions have been eliminated in the past year around the State, and the 4% budget cut this year will lead to the loss of another 233 prosecutors. From this Court's daily perspective, the assistant state attorneys in the Eleventh Judicial Circuit also have extreme caseloads. If the budgetary problems facing the criminal justice system are not addressed by the legislature, the hard working prosecutors may unwittingly find themselves in violation of the Florida Rules of Professional Conduct that governs every lawyer in the State of Florida. With some assistant state attorneys handling up to 300 cases in the Eleventh Judicial Circuit, in spite of hard work and dedication by these attorneys, it is not a stretch to realize that some victims of crimes of Miami-Dade County are not receiving the attention to their case they deserve. At some point in time, the State Attorney's Office, due to lack of funding, excessive caseloads and the loss of attorneys, may have to decide what cases they can prosecute and which ones they will be unable to handle.

[2]This Court strongly urges SAO-11 and PD-11 to meet and consider what other options may assist during this budget crisis. All sides must cooperate on a daily basis in the 23 divisions in trying to amicably resolve cases while being realistic about the strength of each of their positions. Since SAO-11 decides on which cases are filed after arrest, attorneys in the pre-filing division have to be very diligent in their filing decisions.

[3]It should be noted that the Office of Criminal Conflict and Civil Regional Counsel (RRC-3) did not request to participate in the court proceedings as an amicus curiae. However, RRC-3 was noticed in the certificate of service and provided with all legal filings in this matter. Additionally, representatives of RRC-3 were present at all hearings.

[4]The “Weed Attorney Assignment Sheets,” authored by C. David Weed, Executive Assistant Public Defender, reveals what each assistant public defender's caseload is on a given day.

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